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No. 435

IN THE

Supreme Court Of the United States

OCTOBER TERM, 1963

ARTHUR LEVINE, *Petitioner*

v.

EMILY KATHRYN LACY, *Respondent*

PETITION IN OPPOSITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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JURISDICTION

The Respondent invites the Courts attention to the record which discloses that the Federal claim now made in the petition filed herein was first presented in the Supreme Court of Virginia in the form of Petition for Re-

hearing filed by the Petitioner subsequent to the decision of the Supreme Court of Appeals of Virginia rendered April 22, 1963, which Petition for Rehearing was denied without opinion. The Petitioner did not raise the question in the Trial Court.

The facts are analogous to those decided by this Court, *American Surety Co.* v. *Baldwin* (287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98) wherein Mr. Justice Brandeis delivered the opinion of the Court dismissing a writ of *certiorari* stated,

> . . . The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The Federal claim there made cannot serve as the basis for review by this Court. The contention that a Federal right had been violated rests on the action of the Trial Court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but, solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment . . .

QUESTIONS PRESENTED

1. Did the Court err by entering a default judgment in favor of the Respondent?

2. Did the Court err in refusing to set aside the Petitioner's judgment by default?

Assignments of Error by the Petitioner in the State Court were as follows:

1. The Court erred in entering a judgment by default in favor of the plaintiff and in permitting *ex parte* proof of the plaintiff, without notice to the defendant herein.

2. The Court erred in denying the defendants motion to set aside the plaintiff's judgment by default and permit the cause herein to be tried upon its merits.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The United States Constitution, Amendment 14, Section 1, Rule 81 (c)., Federal Rules of Procedure or Title 8, Section 67.3 Virginia Code, 1950 amended, as will appear from the record were never raised by the Petitioner in the Trial Court as will appear from the record.

STATEMENT OF CASE

Petitioner in his Statement of the Case concedes that on February 9th, 1961, the Respondent filed a Motion for Judgment against the Petitioner, seeking damages in the sum of Twenty-Five Thousand Dollars ($25,000.00) for injuries alleged to have been received as a result of a collision due to the negligent operation of an automobile by the Petitioner on August 21st, 1960. Service was made on the Commissioner of the Division of Motor Vehicles, on February 13th, 1961, who forthwith sent by Registered Mail to the Petitioner in Rockville, Maryland, notice of the service and a copy of the process. It is conceded that the notice and process were received by the Petitioner a day or two after February 13th, 1961.

Twenty-four (24) days after Petitioner admittedly received a copy of the notice and process he filed on March 9th, 1961 in the District Court for the Eastern District of Virginia a Petition for Removal (R., 2). At the same time

the Petitioner filed an answer and counter-claim. A copy of each of said pleadings was mailed to the Clerk of the Circuit Court of Loudoun County and filed by him on March 13, 1961 (R., 2). Respondent filed a motion for remand, which was sustained by the District Court and the case remanded to the Circuit Court of Loudoun County on October 4th, 1961.

On the succeeding term day of the Circuit Court of Loudoun County, Respondent moved for a default judgment, which motion was granted and the case set for hearing on the question of damages before the Court on October 25th, 1961 (R., 5), at which time a judgment was rendered in favor of the Respondent for the sum of Nine Thousand Dollars ($9,000.00). On the same day Petitioner, who admittedly had notice of the hearing, moved to set aside the Orders of October 9th, 1961 (Default Judgment) and October 18th, 1961 (Award and Judgment) (R., 5).

On October 27th, 1961 Petitioner filed an amended motion to set aside the Default Judgment or that the awards of same be set aside and the case docketed for trial upon the merits. (R., 7)

On November 6th, 1961 an Order was entered extending the finality of the Order entered October 18th, 1961 (Award and Judgment) for thirty (30) days, which was subsequently extended by Orders entered on December 11th, 1961 and January 5th, 1962 through February 6th, 1962.

On November 16th, 1961 the Circuit Court of Loudoun County entered, as agreed, an Order dismissing the counter-claim which has previously been filed in the Federal Court and a copy filed in the Circuit Court of Loudoun County (R., 9).

On February 26th, 1962 a final Order was entered overruling Petitioner's Motion and Amended Motion, to which Order the Petitioner duly objected and excepted (R., 10).

ARGUMENT I

The Court correctly entered a default judgment in favor of the Respondent.

Petitioner contends that the lower Court erred in entering a default judgment on October 9, 1961, since the file disclosed an answer and counter-claim were copies of the answer and counter-claim filed in the Federal Court.

Under Title 28, Section 1446, U.S.C.A., once the Petitioner's Petition for removal, accompanied by bond, was filed in the Federal District Court for the district in which the action was pending, and notice thereof was given to adverse parties and a copy of the Petition was filed with the Clerk of the Circuit Court of Loudoun County as required by 28 U.S.C.A. Section 1446 (e), all of which Petitioner admittedly accomplished by March 13, 1961, the removal was effected.

The State court was thereby deprived of jurisdiction to proceed further with any phase of litigation, unless and until the case would be remanded by the United States Court. This is true irrespective of whether the action was in fact removable, which is a question for the Federal Court. *Lowe* v. *Jacobs*, 243 F.2d 432 (5th Cir. 1957).

The filing of pleadings in the State Court which would otherwise be valid if the Federal Court found the cause non-removable are barred upon the filing of the Removal Petition. *Beleos* v. *Life & Casualty Ins. Co.* (DC SC) 161 F.Supp. 627.

When the action is removed to the Federal Court, the jurisdiction of the State Court is suspended until the case is remanded by the Federal Court, at which time the State Court resumes jurisdiction, and the case stands as it did at the time of removal. *Dauenhauer* v. *Superior Court*, 149 Cal. App.2d 22, 307 P.2d 724; *Allen* v. *Hatchett*, 91 Ga. App. 571, 86 S.E.2d 662.

No valid proceedings can be taken in the State Court after removal and any action so taken prior to remand to the State Court is of no force or effect. State ex rel. *Gremillion* v. *National Asso. for Advancement of Colored People* (La. App.) 90 So.2d 884.

Copies of the answer and counter-claim filed in the Federal Court and mailed to the Clerk of the lower court along with a copy of the Petition for Removal did not constitute an answer and counter-claim in the suit pending in the lower court for three reasons: (1) the defensive pleadings filed were copies of pleadings filed in the Federal Court and so styled including the designation "answer" rather than grounds of defense, (2) jurisdiction of the lower court having been suspended defensive pleadings could not be filed and (3) Under Rules 3:5 and 3:8 the defendant was in default and since the time for filing pleadings had not been extended by the lower court pursuant to Rule 3:13, no pleadings could be filed without a court order. It is noteworthy that at no time did the Petitioner ask leave to file defensive pleadings.

Petitioner claims that the filing of defensive pleadings in the lower court to a copy of the counter-claim filed in the Federal Court at a time when the lower court was divested of jurisdiction constituted a waiver of the Petitioner's failure to file defensive pleadings to the motion for judgment. It might be well to note that Petitioner admits that the defensive pleadings filed to the counter-claim were

filed by counsel other than counsel representing the Respondent in the motion for judgment. Furthermore it was done at a time when the lower court was divested of jurisdiction to wit: March 23, 1961. The filing of such pleadings are barred. *Beleos* v. *Life & Casualty Ins. Co.*, supra; State ex rel. *Gremillion* v. *National Asso. for Advancement of Colored People*, supra

In *Kingsbury* v. *Brown*, —Idaho—, 92 P2d 1053, 124 A.L.R. 149, Appellant instituted an action against Appellee and others seeking the recovery of damages. Appellee petitioned for removal to the District Court of the United States. Subsequently the District Court remanded, and Appellant moved for a default judgment, the time for the filing of defensive pleadings having expired. On the same day Appellee moved for an order vacating the default judgment, and subsequently the Trial Judge entered an order vacating the default judgment, and allowing the filing of an answer and counter-claim. Appellant appealed on the ground that the lower court erred in entering the order vacating the default judgment and allowing the filing of the Appellee's answer and counter-claim.

In reversing the court stated:

> Upon the filing of the default and default judgment, May 24, 1938 respondent was out of court, and the filing of his answer, June 2, 1938, was unauthorized and void, adding nothing to his legal rights. Jones v. Moers, supra; and the cases therein cited. Appellant's motion to strike the unauthorized and void answer did not affect the conclusiveness of the default or the judgment.
>
> It appears unquestioned that this court has heretofore determined that a litigent attempts to remove and removes a cause from the state to the federal court at his peril and if he makes no appearance in the state court prior to the time of such removal and his default

is entered he cannot thereafter have such default vacated and the judgment set aside on the ground of mistake, inadvertence and excusable neglect.

In *McCanna* v. *Mutual Investment & Agency Co.*, et al. 26 P.(2d) 231, 37 N. M. 537, the appellee filed her complaint on July 2, 1930. On August 23, 1930 appellants filed notice, petition and bond for removal to the Federal Court. No other pleadings were filed. On January 12, 1932 the case was remanded to the State Court and appellee took a default judgment on the same day.

Appellants filed a motion to vacate the judgment on March 10, 1932 alleging a good defense which motion was overruled by the trial court and the appellants appealed. In affirming the Supreme Court of New Mexico said:

(1) That appellants had a good defense to the complaint is not alone sufficient to justify this court in holding the trial court abused its discretion in refusing to vacate a default judgment.

This case comes clearly within the rule laid down and established in this jurisdiction in the case of *Citizens' Light, Power & Telephone Company* v. *Usnik*, 26 N. M. 494, 194 P. 862.

(2-3) We have held adversely to appellants on every question here presented in the Usnik case, and we cannot distinguish this case from the Usnik case. The distinction sought to be made by eminent counsel for appellants that in the Usnik case the appellee waited thirteen days, whereas in this case the appellee took judgment immediately, does not move us. The right to default is as complete and attaches as fully the very moment the state court resumes jurisdiction after remand as at any time subsequent thereto. Appellee had a legal right to his default judgment at the very moment it was entered.

(4-6) Appellants contend that in the justice to their cause, in order to enable them to defend the case on its merits, the order of the trial court be reversed, the judgment vacated and they be permitted to answer. To do justice to both litigants herein we must apply the principles of law and adhere to the established rules of practice and procedure which are known and established in this jurisdiction, for, otherwise what seems justice to one would appear as injustice to another. Justice within the law is justice to all. To achieve this end, we must apply the known and established rules of practice and procedure, and not be tempted to deviate from the established course in a particular case. Appellants and appellee both are charged with knowledge of the procedure in a case of this kind. We laid down the rule in 1921, in the Usnik case, that the party who removes a case to the Federal Court does so at his peril, and it is incumbent upon him to see his rights are protected in the State Court in the event that the Order of Removal is determined by the Federal Court to have been improper and the case remanded. Unquestionable counsel for appellants were familiar with the law, and in their motion to vacate give no valid excuse for failing to demure or answer at the time of filing their Petition for Removal, which procedure is clearly pointed out in the Usnik case. We see no abuse of discretion in the entry of the order of the District Court of Bernalillo County denying appellant's motion to vacate the judgment for appellee. The cause will be remanded for appropriate action.

It would be an anomaly indeed, if a defaulting defendant by making a belated plea for removal to a Federal Court, could thereby secure rights not otherwise available.

The authorities cited by Petitioner under the first Assignment of Error are distinguishable from the case at bar and do not support the allegation that the Trial Court erred in permitting a Default Judgment to be entered in favor of Respondent. In *Salzar, et al.* v. *Schwartz*, 107 S.E. 298, the West Virginia Court held that a Defendant who timely

appeared, pleaded the general issue, filed notice of recoupment and arranged for a continuance, had not waived his right to trial by jury by his failure to appear in the court room when the case was called for trial three years later. In *Covington Virginian* v. *Woods*, 182 Va. 538, the Defendant posted a defective bond in appealing from the adverse judgment of the trial justice, and the Court held that Plaintiff had not waived his right to move for dismissal in the Circuit Court on that ground, merely because he undertook to get a date set for a hearing. The case of *Heath* v. *Valentine*, 177 Va. 731, is not in point, as it concerns the doctrine of equitable estoppel as affecting title to real estate.

> It is sometimes said that waiver is based, or . . . rests, and depends, solely on the intention of the party against whom the waiver is asserted, and is essentially a matter or question of intent, and therefore a waiver must be intentional; an intentional act with knowledge; and it is the intentional relinquishment of a right that lies at the foundation of the doctrine of waiver . . .. The most rudimentary essential of a waiver is that the waiving party shall in some manner publish his intention to relinquish his rights, either by words or conduct; and the intention which is essential to the establishment of a waiver is not the secret intention of the party, rather, it is the intention which is manifested by conduct or words in relation to the matter involved . . . (S)ilence, to constitute a waiver, must be deceptive silence, and it must be accompanied by an intention to defraud which amounts to a positive beguilement. Mere silence is never a waiver where there is no duty or occasion to speak; and where such silence is unaccompanied by any act calculated to mislead, and in the absence of conduct amount to an estoppel, there is no waiver. 92 C.J.S. Waiver, pp. 1057-1065.

In the case at bar, Respondent never intended to relinquish her right to a default judgment. Her conduct or

words in responding to the counter-claim asserted against her in the Federal Court did not maifest an intent to waive her rights under Rules 3:5 and 3:19 concerning her claim in the State Court. Her silence as to her right to Default Judgment came at a time when the State Court was temporarily divested of jurisdiction to entertain a motion to that effect, and therefore came at a time when Respondent had no ruty or occasion to speak. Promptly upon remand, Respondent took such steps as were necsssary to secure her right to default judgment. At no time was Respondent's silence in any way deceptive, nor was it accompanied by an intention to defraud.

ARGUMENT II

The Court correctly refused to set aside Petitioner's judgment by default.

Petitioner contends that he filed an answer in the lower court, however, the record disclosed on such filing. True, a copy of the answer filed in the Federal Court was mailed to the Clerk of the lower court and also to counsel for the Petitioner, but these were pleadings to be met in the Federal Court not the lower court. The appending of a certificate under Rule 3:15 would confer no additional dignity nor would the filing by the lower court Clerk of such pleadings remove their void status.

Petitioner claims that the filing of a copy of the Petition for Removal in the lower court constituted a general appearance. A general appearance is submission to the jurisdiction of the Court (Black's Law Dictionary) which is the antithesis of removal. In 3 AM. JUR., *Appearance*, Section 29, the author states:

> It is now well settled, both in the Federal Courts and in most of the state courts which have considered the point, that an appearance in a state court merely for the purpose of presenting an application for removal to a Federal Court does not constitute a general appearance.

Petitioner says that Rule 3:5 should be read together with Rule 3:13 which permits the Court in its discretion to extend the time for filing of pleadings. Suffice it to say that no motion was ever made for such an extention nor cause shown why an extension should be granted. At no time has the Petitioner as much as alleged he had a valid defense to the Respondent's claim.

In *Cooper* v. *Davis, an infant, et.*, 199 Va. 472, 100 S.E.2d 691, on December 7, 1955, Plaintiff filed a motion for judgment against the Defendant for damages sustained as a result of injuries received while on the Defendant's premises. No defensive pleadings were filed, and a default judgment was entered on April 10, 1956. On the same day the default judgment was entered, the Defendant appeared by counsel and denied knowledge of the action and claimed to have a valid defense. Whereupon the default judgment was vacated.

Subsequently Defendant filed a motion to quash the Service of Process which was overruled by the Court at a later hearing. On November 7, 1956, Defendant by other counsel filed a new motion to be relieved of default, and there was tendered and asked leave to file his grounds of defense and an affidavit denying ownership or control of the premises. Plaintiff objected to the filing of the grounds of defense and the affidavit, and the lower court sustained the objection. Defendant appealed assigning as error that the lower court erred in not permitting the Defendant to file his grounds of defense to the case on its merits.

In affirming this Court stated at Page 476:

> The trouble with the defendant's contention is that his diligent pursuit for judicial relief was begun too late. Rule 3:5 'contemplates and requires that a defendant file his responsive pleadings "within twenty-one (21) days after service on him of the notice of motion for judgment."' (Herndon v. Wickham, 198 Va. 824, 826, 97 S.E.2d 5, 7.) The notice of motion for judgment served on the defendant, prepared in accordance with Rule 3:3, so told him in plain language. Yet the defendant made no attempt to file the required pleadings for more than four months after the service of the notice on him...
>
> But if such statements in the defendant's testimony and affidavit are taken at their face value they merely amount to a showing of gross neglect and carelessness on his part, and do not constitute a reasonable or legal excuse for his failure to comply with the rule. It is a plain case where the lower court, in the exercise of the discretion lodged in it by Rule 3:13, was fully justified in refusing to allow the defendant to file his grounds of defense after having been so long in default.

Petitioner states that the judgment should have been set aside since there is no showing that the Respondent's rights would be jeopardized, or that she would have been taken by surprise by extending the time to answer. The record certainly does not disclose this and there is no statement of fact that would justify such a conclusion. Clearly there would be an abuse of discretion to allow the filing of a late grounds of defense without just case shown. *Turner v. Buick Corporation*, 201 Va. 693, 695; 112 S.E.2d 911. Without such a showing an extension of time under Rule of Court 3:13 would be arbitrary rather than discretionary.

Inasmuch as Petitioner admits receipt of process not later than February 15, 1961, there is little merit to the contentions that his non-residency should afford him additional considerations. Where the Court has extended the time for filing grounds of defense it has been on a showing of cause. See *Insurance Company v. Bresterman*, 201 Va. 822, 823, 113 S.E.2d 862, re: late answers in chancery cause under Rule 2:23, which corresponds to Rule 3:13 in actions at law, *Turner* v. *Buick Corporation*, 201 Va. 693, 695, 112 S.E.2d 911.

Authorities cited by Petitioner in regard to the second Assignment of Error do not support the contention that the lower court erred in refusing to set aside the default judgment. In *Herndon* v. *Wickham*, 198 Va. 824, the action of the trial court in permitting Defendant to amend grounds of defense which had been timely filed was held to be a proper exercise of discretion under Rule 3:13. In the case at bar, however, no responsive pleadings were filed within twenty-one (21) days. It is to be noted that this Court, at page 826, stated that Rule 3:5

> . . . contemplates and requires that a defendant file his responsive pleadings within twenty-one (21) days after service on him of the motion for judgment.

In *Williams* v. *Service Corp.*, 199 Va. 326, although no responsive pleadings had been filed by Defendant within twenty-one (21) days, the trial court gave Defendant an extension of time within which to file grounds of defense. No such action was taken by the trial court, nor requested by Defendant, in the case at bar. In *Jacobson* v. *Southern Biscuit Co.*, 198 Va. 813, the Supreme Court of Appeals merely sustained the action of the trial court in permitting Plaintiff to amend his motion for judgment to change the name of Defendant, where the right Defendant was before

the Court under the wrong name. In *Turner* v. *Burford Buick Corp.*, 201 Va. 693, the trial court allowed Defendant to file grounds of defense after twenty-one (21) days "for good cause shown," and the Supreme Court of Appeals sustained this action. In the case at bar, no effort was ever made by Petitioner to show good cause for not having filed responsive pleadings on time.

Petitioner contends he was denied due process of law, certainly he had an opportunity to defend and for reasons known only to the Petitioner he failed to file responsive pleadings, and presumably rested on his rights to appeal the remand ordered by the Federal Court, the case presents a situation similar in *American Surety Co.* v. *Baldwin* (287 U. S. 77 L. Ed. 231, 53 S. Ct. 98) wherein this court stated . . .

> . . . The fact that its opportunity for a hearing was lost because misapprehesion as to the appropriate remedy was not removed by judicial decision until it was to late to rectify the error does not furnish the basis for a claim that due process of law has been denied. Compare O'Neil v. Northern Colorado Irrig. Co. 242 U. S. 20, 26, 61 L. Ed. 123, 128, 37 S. Ct. 7. Having invoked the state procedure which afforded the opportunity of raising the issue of lack of notice, the Surety Company cannot utilize the same issue as a basis for relief in the Federal Court. Federal claims are not to be prosecuted piecemeal in state and Federal courts, whether the attempt to do springs from a failure seasonable to adduce relevant facts, as in Grubb v. Public Utilities Commission, 281 U. S. 470, 479, 74 L. Ed. 972, 979, 50 S. Ct. 374, or from a failure seasonable to pursue the appropriate state remedy.

CONCLUSION

1. Petitioner had ample time within which to file defensive pleadings in the Circuit Court. No excuse is given

for such failure, nor was just cause shown for an extension of the time for filing late pleadings.

2. With knowledge of the default judgment and of the hearing on the question of damages Petitioner failed to show any facts that would justify the Court in setting aside its judgment.

Respectfully submitted,

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